No. 12,534

IN THE

United States Court of Appeals

For the Ninth Circuit

WINSTON CHURCHILL HENRY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

APPELLANT'S REPLY BRIEF.

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FOREWORD.

Two errors occurring in appellant's opening brief should be corrected. The first error is the date on page 2 in line 3 of the Statement of the Case. The date should be July 16, 1949, and not July 16, 1939. T 2. The second error is the statement on page 3 that the sentences of imprisonment of 4 years and 2 years imposed upon appellant were to run concurrently. The same error occurs at page 2 of the brief for appellee. The fact is that these sentences of imprisonment were to run *consecutively.* T 33.

1. **THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE FIRST COUNT OF THE INDICTMENT.**

Under this subdivision of his opening brief the appellant invoked the rule that his uncorroborated confessions and admissions as to possession were inadequate to support or sustain a conviction on the first count. At page 6 of its brief the appellee urges that this rule has no application to admissions and that admissions only are here involved. But the rule is not so limited. In addition to the cases cited at pages 13 and 14 of the opening brief, these may be added: *Pines v. United States,* 8 Cir. 123 F. 2d 825, 829; *Gulotta v. United States,* 8 Cir. 113 F. 2d 683, 685; *Ryan v. United States,* 8 Cir. 99 F. 2d 864, 869; *Duncan v. United States,* 9 Cir. 68 F. 2d 136, 143. The statement of the rule in *Gulotta v. United States,* 8 Cir. 113 F. 2d 683, 685, is as follows:

> "The appellant's second contention is the more serious. It is that the evidence is not sufficient to support conviction. He relies upon the long-established rule that 'extrajudicial confessions or admissions are not sufficient to authorize conviction of crime, unless corroborated by independent evidence of the corpus delicti.' "

The appellee relies heavily on *Ercoli v. United States,* 131 F. 2d 354. (BA 6.) However, appellee's quotation therefrom shows that the court was not concerned with confessions or admissions but was solely concerned with *exculpatory statements.* Statements of that character are not here involved.

2. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE SECOND COUNT OF THE INDICTMENT.

What has just been said has equal application, of course, to this specification.

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3. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF DEPUTY COLLECTOR PATTERSON RESPECTING DEMAND MADE UPON APPELLANT ON SEPTEMBER 27, 1949, TO PRODUCE ORDER FORMS REQUIRED BY 26 U.S.C., SEC. 2091, WHICH MOTION WAS MADE ON THE GROUND THAT DEMAND WAS NOT MADE UNTIL AFTER THE INDICTMENT HAD BEEN RETURNED AGAINST APPELLANT.

The appellee is mistaken in supposing that appellant's Specification of Error No. 3 was an attack upon the indictment. (BA 9.) It was an attack upon the testimony as to demand because the demand had not been made within a reasonable time. Therefore, the case of *Cratty v. United States,* 163 F. 2d 844, decided in the District of Columbia, and upon which appellee relies (BA 9), does not furnish a complete answer to the specification, as appellee supposes. The decision of this court in *Symons v. United States,* 9 Cir. 178 F. 2d 615, 621, leaves no doubt that such demands must be made within a reasonable time. On the record before the court, appellant urges that the demand was not made within a reasonable time and that his specification of error is well taken.

4. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF GOVERNMENT WITNESSES RELATING TO INCRIMINATORY ACTS OF, AND CONVERSATIONS WITH, THE APPELLANT AFTER SERVICE OF THE SEARCH WARRANT, WHICH MOTION WAS BASED ON THE GROUND THAT APPELLANT WAS UNDER ILLEGAL RESTRAINT AFTER SUCH SERVICE AND NOT ACTING FREELY AND VOLUNTARILY.

In support of this Specification the appellant cited *Upshaw v. United States,* 335 U.S. 410, 411, 414, 69 S. Ct. 170-172, and *United States v. Baldocci,* D.C. Cal. 42 F. 2d 567, 568. Both passed unchallenged in the brief for appellee. (BA 9-11.) Both impel the conclusion that the Specification of Error was well taken.

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5. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF OFFICER KINNEY AS TO A CONVERSATION WITH APPELLANT AT THE POLICE STATION REGARDING GUNS, WHICH MOTION WAS MADE ON THE GROUND THAT THE CONVERSATION WAS IRRELEVANT AND IMMATERIAL.

Appellee contends that the conversation was *general* and extended to narcotics. (BA 11.) The record quoted at pages 25 and 26 of appellant's opening brief shows that the conversation was *special* and had reference to guns only. Therefore, the Specification is well taken.

6. THE DISTRICT COURT ERRED TO THE PREJUDICE OF APPELLANT AND APPELLANT WAS DENIED A FAIR TRIAL BY THE COURT DENYING THE REQUEST OF THE JURY DURING ITS DELIBERATIONS FOR A TRANSCRIPT OF THE INSTRUCTIONS GIVEN, AND BY GIVING A NEW AND SUPERSEDING JURY CHARGE WHEREIN THE BOUNDS OF PROPER COMMENT BY THE COURT WERE EXCEEDED.

The appellee does not deny and cannot deny that instead of complying with the jury's request the trial court gave a new and superseding jury charge, which was virtually another argument for the prosecution, which overstated the case of the government and understated and belittled the case of the defendant, and which wiped out the jury charge which the jury asked to have repeated. The sole answer of the appellee is that despite the form and character of the superseding jury charge it was immunized and isolated from error because the court told the jury on several occasions that they were to determine the facts. (BA 12.) The answer is insufficient. If cases additional to those cited in appellant's opening brief at pages 29 and 30 be deemed necessary, it is enough to cite the decision of this court in *Cal-Bay Corporation v. United States,* 9 Cir. 169 F. 2d 15, 22-23.

CONCLUSION.

The appellant therefore again respectfully submits that judgment and sentence should be reversed as to each count.

Dated, San Francisco,
October 25, 1950.

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